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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT OF SAME.

SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

1 In the Supreme Court of the United States. October term, 1898.

WILLIAM M. STRATHER, PETITIONER,
v. No. 432.
THE UNITED STATES, RESPONDENT.

Petition of William M. Strather for a writ of certiorari to the court of appeals of the District of Columbia.

To the honorable the Supreme Court of the United States:

The petition of William M. Strather respectfully shows to this honorable court as follows:

1st. That he is a citizen of the United States and a resident of the District of Columbia.

2 2d. That heretofore, to wit, on the 31st day of December, 1897, in the supreme court of the District of Columbia, holding a criminal term, the grand jury of the United States of America, in and for the District of Columbia, at said term of said court, found, returned, and filed in said court against your petitioner an indictment charging him under section 5339 of the Revised Statutes of the United States, with the crime of murder. Said section reads as follows:

Every person who commits murder—

1st. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

2d. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime
3 jurisdiction of the United States, and out of the jurisdiction of any particular State;

3d. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

3d. That thereupon the trial of your petitioner upon and under said indictment was proceeded in, and on, to wit, the 10th day of February, 1898, the jury impanelled to try said cause returned a verdict of "Guilty in manner and form as charged in the indictment" against your petitioner.

4th. That thereupon and within the time therefor limited your petitioner filed in said court a motion for a new trial, alleging
4 various errors occurring during the trial of said case prejudicial to the defendant, but more particularly to the error committed by the trial judge in his charge to the jury as to his construction and interpretation of the act of Congress approved January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted." (Vol. 29, Statutes at Large, page 487.) Said act is as follows:

"That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid, the person con-

victed shall be sentenced to imprisonment at hard labor for life."

The charge with relation to the act is as follows:

"If you should reach the conclusion, gentlemen of the jury, that your verdict should be guilty as indicted, it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.'

"As I had occasion to remark yesterday, the jury have this power in any given case. The court can not control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy
6 or mercy rendered a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it.

"Doubtless the intention of the legislature was this: That in a case in which the jury reach the conclusion that the party on trial is guilty of murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands.

It may be that a provision of this kind in the law was intended
7 to apply to a case somewhat like that suggested by the district attorney. Suppose a man knowing that his wife had been in improper relation with another man, and, roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases; I simply give this as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict. I should say right here, gentlemen, that if you reach the
8 conclusion of guilty—'guilty as indicted'—it is your duty to return that verdict; and unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you, upon your oaths, to interfere with the penalty fixed by law? The defendant and the woman he slew were living together in adultery. It may be that neither of them was a good and useful citizen in this community, but he is entitled to the protection of the law. He should not be convicted unless the evidence justi-

fies a verdict of guilty, as the court has explained to you. She was also entitled to the protection of the law, and the mere fact that
9 she was a woman of loose morals, living in open adultery with this man, should make no difference whatever with you in your judgment upon the evidence.

"The responsibility of the outcome of this case is with you entirely. The court can not help you any further. You are not responsible for the law. The law has been made by the Congress of the United States, and has received the approval of the Chief Executive. It was made for your protection and for mine. The law should be vindicated in any case and every case where the evidence shows that it has been violated. Neither are you responsible for the situation or state of affairs that has been shown by this prosecution and the evidence in support of it. If this man killed this woman, he created the situation. You are not responsible for it. You are simply to determine, upon your
10 oaths, whether the circumstances are such as to require you to return a verdict of guilty as indicted; or, if not guilty as indicted, whether it justifies you, requires you, to return a verdict of guilty of manslaughter; or, if not guilty of either murder or manslaughter, a verdict of not guilty."

5th. That thereafter, on, to wit, the fourth day of March, 1898, the trial court overruled said motion and entered its judgment and sentence upon said verdict of the jury, as aforesaid, that petitioner be hanged by the neck until he be dead, on Thursday, the fifth day of May, A. D. 1898; whereupon your petitioner prayed an appeal to the said court of appeals from the judgment and sentence of said trial court.

6th. That thereafter, your petitioner having duly perfected his said appeal, the said court of appeals on, to wit, the 7th day of June,
11 1898, rendered its judgment affirming, by a divided court, the judgment and sentence of the trial court, as follows:

"In the presence case, the justice at the trial below fully charged the jury both as to the law and as to his view of the facts, but leaving the facts entirely to the jury. And with respect to the amendatory act of January 15, 1898, the judge was explicit in charging the jury that, if they concluded that the accused was guilty of murder, it was their right, under the act of Congress, to add to their verdict 'without cap'tal punishment.' He further said: 'I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress. That is fixed by law, and the jury can neither make nor unmake it. Doubtless the intention of the legislature was this: That in a case in which the jury reached the
12 conclusion that the party on trial is guilty of murder, and circumstances are shown by the evidence that are of a palliating nature, they may give the accused the benefit of those palliating circumstances, and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything to their verdict, but to leave the penalty as it stands." And the judge further added: "But the object of this penalty is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy the jury that this qualification provided by the statute should be added to their verdict."

"This, we think, was clearly right. If it was not the intention
13 of Congress to abolish capital punishment, but to leave the matter of degree of guilt to the finding of the jury, that must, in the nature of things, depend upon the facts of the case. We think the judge below was strictly right in the interpretation of the act of the 15th of January, 1897, and that there was no error in the terms of the charge to the jury. The jury were left entirely free under the instructions of the court to determine the question whether the circumstances of the crime charged were of a character to justify them in returning a verdict for the mitigated punishment or such as was returned by them.

"In several of the States of the Union statutes substantially similar to that of the act of Congress of January 15, 1897, exist, and in many of such States those statutes have been construed by the courts and
14 given practical application; and, with but one or two exceptions brought to our attention, those statutes have been construed and applied under the direction of the courts in the same manner that the act here in question has been construed and applied by the court below in the charge given the jury. The People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bowden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Luman vs. The State, 72 Ga., 269; Valentine vs. The State, 77 Ga., 483; Nowaeryk vs. State, 139 Ill., 336. In all of these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case.

"Finding no error, the judgment appealed from must be affirmed, and it it so ordered."

15 The dissenting opinion reads as follows:

"I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder the jury may qualify their verdict by adding 'without capital punishment.'

"In my opinion, the language of the act is plain and affords no room for construction—no appeal from its letter to its spirit. Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared. To my mind, it appears plain that while Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its
16 infliction to the uncontrolled discretion of the jury in each case.

"If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court or upon the jury, subject to the advice and admonition of the court, I think it would have been so expressly declared. Whether in the exercise of an unlimited discretion juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or in practice virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

"In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may

17 commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding. With such instructions as were given in this case, no jury composed of good citizens, accustomed as to their duty to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. After such an admonition to such a jury, the further information that they might, nevertheless, commute the punishment, was but a meaningless formality. It did not give the accused the benefit of the statute.

"I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the State, whereby the offense of murder has been divided into
18 two degrees—murder of the first and murder of the second degree.

"On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder in the second degree.

"In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder
19 of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty. If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all unless the evidence should discover something tending to warrant the exercise of clemency. For the reasons given, I am of the opinion that the judgment in each case should be reversed."

7th. Your petitioner is advised and believes that the said judg-
20 ment of the court of appeals of the District of Columbia is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of the Congress of the United States entitled "An act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals of the District of Columbia in the same cases and manner that it may do in respect of the circuit court of appeals," approved March 3, 1897 (vol. 29, Statute' at Large, page 692), which act is as follows:

Be it enacted, etc., That in any case heretofore made final in the court of appeals of the District of Columbia, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case
21 to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if had been carried by appeal or writ of error to the Supreme Court.

8th. And your petitioner further shows that, as has been heretofore determined by this court, he has no right of appeal or writ of error in this case, for the reason that this court has no jurisdiction to review the decision of the court of appeals of the District of Columbia in criminal cases except in the manner and as provided in said act of Congress approved March 3, 1897.

9th. Your petitioner respectfully submits that the question presented by this record should be authoritatively and finally adjudged by this honorable court upon and after a full hearing. The case is one of
22 the utmost gravity and importance, not only to your petitioner, but to every citizen in the land, and hence it is of the highest importance that *that* the highest court in the land shall adjudge the law involved in this case, and thus lay down an authoritative and sound rule of construction of said statute for the guidance of the courts in cases of a similar nature.

10th. That on the 27th day of April, 1898, the court of appeals signed an order staying the execution of your petitioner until decision of appeal; the President, on May 5th, 1898, signed an order granting him respite until June 16, 1898. On the 15th day of June, 1898, the President signed another order granting respite to your petitioner until January 5, 1899.

Wherefore your petitioner respectfully prays that he be allowed a hearing on his petition and that a writ of certiorari may be
23 issued out of and under the seal of this court, directed to the court of appeals of the District of Columbia, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said court of appeals of the District of Columbia in the said case therein, entitled William M. Strather, appellant, v. The United States, No. 795, April term, 1898, to the end that the said case may be reviewed and determined by this court as provided in the act of Congress entitled "An act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals in the same cases and manner that it may do in respect of the circuit court of appeals," approved March 3, 1897, and that your petitioner may have such
24 other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said court of appeals of the District of Columbia in said case may be reversed by this honorable court, and your petitioner will ever pray, etc.

WILLIAM M. STRATHER,
Petitioner.
SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, William M. Strather, being duly sworn, on oath says, that I am the petitioner in the aforegoing petition by me subscribed; that I have read the same and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

WILLIAM M. STRATHER.

Sworn and subscribed to before me this 8th day of October, 1898.

[SEAL.] CHARLES W. STETSON,
Notary Public.

25 In the Supreme Court of the United States.

WILLIAM M. STRATHER, PETITIONER,
v.
THE UNITED STATES, RESPONDENT.

To the honorable the Attorney-General of the United States:

SIR: Please take notice that on the 11th day of October, A. D. 1898, at the opening of the court, or soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said court thereon.

SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

The foregoing notice is hereby accepted, and service of a copy of said petition for writ of certiorari is hereby acknowledged this 10th day of October, 1898.

HENRY E. DAVIS,
For Attorney-General of the United States.

26 Supreme Court of the United States. October term, 1898.

WILLIAM M. STRATHER, PETITIONER,
vs.
THE UNITED STATES, RESPONDENT. No. 432.

Brief in support of petition for a writ of certiorari to the United States from the District of Columbia court of appeals.

Petitioner was convicted of murder, charged under section 5339 of the Revised Statutes of the United States, and sentenced to be hung by the neck till dead.

By the act of Congress approved January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted" (29 Stat. at Large, p. 487), it is provided, among other things, "That in all cases where the accused is found guilty of the crime of murder or rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

This case presents for construction the above-mentioned act of January 15, 1897, and this is the first time the said act has been so presented to this court. There are no adjudications of it by lower courts, except the one from which we ask that this case be certified.

27 The District of Columbia court of appeals erred in affirming a judgment based on the verdict of a jury instructed by the trial

judge prejudicial to petitioner and not permissible under a right construction of said act.

The trial judge and the District of Columbia court of appeals have administered the law of murder as though this act determined the grades of murder, while it does not, but only fixes either of two certain punishments for the same grade of murder, and leaves it entirely with the jury to determine which shall be inflicted.

The act, in relation to murder, takes from the court and imposes on the jury all discretion in the matter of sentence or penalty. The law provides either of two specific penalties for all cases of murder. The courts below have erred in holding that the penalty for murder has not been by this act changed, and in holding that not in all cases may the jury render a qualified verdict, but only in certain cases, and those cases in which there are palliating circumstances.

There is no other law like this one, and there are few decisions that throw much light on the question. Nearly all that are held to bear on the law of this case are cited in the opinion of the District of Columbia court of appeals.

In the Bram case, tried in Boston under this act, the trial judge on this point instructed the jury as follows: "But if you find the defendant guilty, the law gives you the power to add to it 'without capital punishment.' You are not required to say 'without capital punishment,' for if such be your judgment, you need make no expression in regard to it."

Persons convicted of murder anywhere in the United States except the District of Columbia may come to this court by right of appeal, but in this District there is no other way to reach this court than by
28 certiorari, a means entirely in the discretion of the court.

This case presents a situation more important than any property rights, as it involves directly the life of this petitioner and the lives of two others who are now under death sentence in the District, and who are also praying for a hearing in this court. In all Federal courts this same question is likely to arise soon, and there are now five or six men under indictment in the District of Columbia and awaiting trial, so that, as this question now presents itself to the court, it involves six or eight human lives.

The court of appeals for the District of Columbia has disposed of this momentous question by a divided court, and it seems that the Federal judge in Boston who presided at the Bram trial holds with the dissenting judge of the District court of appeals. In view of the importance of this question, the diversity of holdings below, the fact that it is desirable and advantageous to have uniform administration of this act, the probability that decision of this matter now will prevent numerous appeals and petitions to this court in like cases, and the fact that in no other manner than by petitions similar to the one in this case can persons convicted of murder in the District of Columbia be heard here, it is respectfully submitted that the prayer of petitioner for certiorari ought to be granted.

SAMUEL D. THOMPSON,
TRACY L. JEFFORDS,
Attorneys for William M. Strather.